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United States Supreme Court
FILED
MAY 13 1955
HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1954.

No. 732

MERCHANTS MATRIX CUT SYNDICATE, INC., INTERTYPE CORPORATION, AND THE ADVERTISING CHECKING BUREAU, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA AND CLARK-CONGRESS CORPORATION,

Respondents.

BRIEF OF CLARK-CONGRESS CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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May 12, 1955.

THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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ADDITIONAL STATEMENT OF THE CASE.[1]

The Treasury Department selected the Rand McNally Building as suitable to it for the Bureau of Public Debt. (R. 842, 843.) This selection was communicated to the

[1] For convenience the parties herein are referred to as follows: Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., collectively as "Petitioners" but separately as "Merchants", "Intertype" and "Advertising", respectively; Clark-Congress Corporation either as "Respondent" or "Clark-Congress;" General Services Administration as "GSA"; respondent United States of America as "the Government".

Administrator of General Services Administration (R. 843); and the Regional Director of GSA, for the district in which Chicago is located, was instructed about June 13, 1951 by the Administrator of GSA to acquire this building for the use of the Government. (R. 843.) In addition to acquiring the interest of Clark-Congress in the building by lease, subject to all existing tenancies, GSA acquired the interests of all other tenants in the building, except petitioners, by December 1, 1951.

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REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

All of the transactions involved in the cross-claims cases are part of or related to the project of the Government to acquire and fit the Rand McNally Building, in Chicago, for the use of the Bureau of Public Debt. The petition is predicated on the erroneous premise that the alleged acquiescence of Clark-Congress in the noise, dust and disturbance created by the Government in rehabilitating the Rand McNally Building renders Clark-Congress liable for petitioners' expenses in moving from the premises. But the Court of Appeals held that the moving expenses resulted from the declaration of taking filed in the condemnation case.

Petitioners were tenants under leases in the Rand McNally Building. The Government acquired the interest of Clark-Congress, the landlord, by lease which was "in lieu of condemnation proceedings." (R. 974, 986.) The Government arranged with all other tenants, except petitioners, for the termination of their leases. Condemnation proceedings were instituted against petitioners, and their interests were acquired by a declaration of taking.

Upon trial, petitioners proved no damages against the landlord on account of any dust, noise or other disturbance or because of any interference with their business operations. They made proof only with respect to moving expenses (and the value of the Advertising leasehold hereinafter discussed, p. 11) despite the extravagant charges in the cross-claims relative to noise, dust, disturbance and conspiracy.

Petitioners enjoyed their premises and carried on their businesses until they moved pursuant to the declaration of taking and orders of the District Court in the condemnation proceedings to surrender possession to the Government. Nothing which Clark-Congress did caused them to move.

As the Court of Appeals stated (Op. 82):

> "Whether the ultimate theory of recovery against Clark-Congress is conveniently blurred in the pleadings or evidence is now beside the mark, since a declaration of taking was filed and processed. * * * Their interests were acquired by and to the extent of that declaration of taking."

The Court of Appeals said (Op. 82):

> "Regardless of how it is articulated each such pleading reverts to, and each is bottomed on, claiming damages because these three tenants had to find quarters elsewhere, and move."

The court also said (Op. 84):

> "Moving expenses are so inextricably woven into the termination of these leases upon the taking of the Government *U. S.* v. *Advertising Checking Bureau*, 204 F. 2d 770, 772 (7th Cir. 1953) *that they cannot be recovered indirectly, or on the side.*" (Emphasis supplied.)

To repeat, the Court simply held that the moving expenses, a consequence of condemnation by the Government, could not be included in petitioners' damages.

The Court of Appeals did not, as alleged (pet. 27), ignore or fail to follow the law of Illinois that a tenant has a cause of action against a landlord "who disturbs * * * his quiet enjoyment of the demised premises." This rule does not reach damages that result from the taking by the Government. But Illinois has held that a

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covenant of quiet enjoyment and possession does not extend to protect a lessee against the exercise of sovereign power in taking property for a public use. *Corrigan, et al. v. Chicago et al.*, 145 Ill. 537, 543 (1893). The Illinois Supreme Court held in that case that the lessee takes, as every other interest in land is taken, *subject to the exercise of the power of eminent domain whenever the public necessity and convenience demand it.*

It is also the law of Illinois that moving expenses may not be recovered in an action of tort by a tenant against his landlord. *Tobin* v. *French*, 93 Ill. App. 18, 22.

Petitioners assert (pet. 22) that the decision below is in "irreconcilable conflict" with decisions of this Court holding that the immunity of the sovereign does not protect parties with or through whom the sovereign deals against liability to those whom they may injure. There was no such issue in this case. The decision below in no wise conflicts with any decision of this Court. The Court of Appeals did not hold that Clark-Congress was immune from liability on any theory of sovereign immunity. All it held was that Clark-Congress was not liable for the moving expenses of these petitioners because their moving expenses were occasioned solely as a result of the declaration of taking.

ARGUMENT.

I.[2]

We discuss only such Questions Presented (pet. 2) and Reasons for Granting the Writ (pet. 14) as relate to the judgments against Clark-Congress.

This cause should not be reviewed by this Court, for the reason that the above mentioned Questions Presented and Reasons for Granting the Writ are totally unrelated to the decision of the Court of Appeals.

That decision was that the moving expenses could not be recovered. The court did not disregard the evidence or the findings of fact; but stated "they are estranged from significant items of evidence disclosed by this record." (Op. 83.) These significant items of evidence were: (1) A declaration of taking was filed December 12, 1951 by the Administrator of GSA by which the "right to use and occupy" the space of each petitioner in the Rand McNally Building was taken for the use of the Government for a term of years commencing January 1, 1952 (R. 9); (2) On December 26, 1951, an order was entered by the District Court that Intertype Corporation surrender possession of the premises "now occupied by it" to the Government on January 31, 1952 (R. 35); (3) On the same day the District Court ordered that Merchants Matrix Cut Syndicate, Inc. and The Advertising Checking Bureau, Inc. surrender possession of the premises "now occupied by them" on or before May 31, 1952 (R. 37); (4) Intertype surrendered possession of its premises on January 11,

[2] This brief follows the Roman numeral headings of the Petition for a Writ, beginning at p. 15.

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1952, the date it claimed to have been evicted (R. 41); (5) Advertising in its answer to the complaint, filed January 21, 1952, alleged: "Pursuant to said order (the order of surrender of December 26, 1951) and *in compliance therewith*, this defendant is about to vacate the premises as aforesaid as required by said order" (R. 44); (6) Merchants alleged in its cross-claim (R. 56) that it had occupied its space continuously from April 1, 1922 until the "12th day of December, 1951, at which time cross-claimant was evicted from said premises; that since such time cross-claimant's occupancy of aforesaid space *has been under an order of this court* allowing cross-claimant to remain in possession of these premises until the 31st day of May, 1952 * * *;" (7) Advertising moved out of the premises in March, 1952 (R. 718); and Merchants moved out of its premises on April 23, 1952 (R. 418); (8) The judgments entered in the condemnation case (tried before the cross-claims case), in favor of Intertype and Merchants, on their motion, adjudged the compensation the Government should make "for the taking of the leasehold estate" of each of them (R. 619); (9) All of the transactions are encompassed in an entire project of the Government to acquire and fit the Rand McNally Building for the use of the Bureau of Public Debt: (a) The Treasury Department selected this building (R. 843); (b) The Regional Director of GSA for Region 5 (which includes Illinois) was authorized prior to June 22, 1951 to acquire the use of this building (R. 675, 843); (c) On June 22, 1951, the interest of Clark-Congress, the landlord, was acquired by lease; (d) Thereafter and prior to January 1, 1952 the leases of all of the tenants, except petitioners, had been terminated and the Government had acquired their spaces (cross-claimants Ex. 10, R. 1004); (e) The interests of petitioners were acquired through the condemnation proceeding instituted by the district attorney at the request

of the Administrator of GSA and by his declaration of taking. (R. 7.)

These various acquisitions by lease from the landlord and termination of tenancies, must be treated as taken by condemnation. In *Woodville* v. *U. S.*, 152 F. 2d 735, 738 (C. C. A. 10th, 1946 certiorari denied, 328 U. S. 842), brought to condemn streets and alleys, the court said: "While the government acquired the various pieces of property, including the tract in question, by contract with the respective owners, and at different times, the respective rights and interests of all the parties must be considered as though the government had proceeded against all of them in a single condemnation proceeding."

These "significant items", detailed above, convinced the court below that the moving expenses for which petitioners obtained judgments flowed from acts of the Government in acquiring the property and did not result from the alleged acts of Clark-Congress. The position of the court below, as reflected in the opinion, is that the moving expenses were a necessary and direct consequence of the filing of a declaration of taking by the Administrator of GSA and the orders of the District Court that petitioners surrender possession to the Government. This position is correct as is shown by statements in the cases noted below.

First of all, upon the filing of a declaration of taking, 40 U. S. C. 258a gives the court power to fix the time within which parties in possession "shall be required to surrender possession." In *United States* v. *Petty Motor Co.*, 327 U. S. 372, 378 (1946) the court said the costs of removal or relocation "are personal to the lessee. The lessee would have to move at the end of his term unless the lease was renewed." At p. 380 the Court speaks of the tenant's removal as "its ouster by the order of possession." In *United States* v. *Westinghouse E. & Mfg. Co.*, 339 U. S. 261, 262, the Court said: "Respondent, in order

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to comply with the District Court's order of immediate possession, incurred expenses for the removal of its personal property." At p. 266, the Court speaks of the tenant as the "ousted leaseholder". In *William Wrigley, Jr. Co.* v. *United States*, 75 Ct. of Cl. 569, the court said, that just compensation does not include "consequential damages resulting from a forced removal of property taken by the Government." It also said: "These are all inconveniences and expenses incidental to the surrender of possession * * * The title to all property is held subject to the implied condition that it must be surrendered whenever the public interest requires."

The court below took into consideration, not only the rule that moving expenses are consequential damages, necessitated by the taking and the order to surrender possession, but also the rule that quiet enjoyment covenants are not violated through or by the exercise of the power of eminent domain.

Under Illinois law a covenant of quiet enjoyment does not extend to protect against the exercise of the sovereign power in taking property for a public use. In *Corrigan, et al.*, v. *Chicago, et al.*, 144 Ill. 537, 543 (1893), the court said:

> "The lessee takes the term as every other interest in land is taken, subject to the exercise of that power (eminent domain) whenever the public necessity and convenience demand it. He holds and enjoys the estate granted, subject to the exercise of the sovereign power to appropriate his land to a public use, upon paying to him just compensation; and if he suffers loss, or is deprived of his estate, he is provided with the same remedy that is given to all other owners, and holds his title subject to this right, as the landlord holds his title. Hence, it has been held that a taking under the right of eminent domain is not a breach of the covenant for quiet enjoyment, and does not technically amount to eviction."

In *Frost* v. *Earnest*, 4 Whart 86, a case very generally cited, and cited in a number of Illinois cases, it is said:

> "The remedy of the vendee is to look to the legislative provisions made for his indemnity, and not to the covenant of quiet enjoyment, which was introduced into conveyance for purposes entirely different."

Other cases to the same effect are *Osborn* v. *Nickolson*, 80 U. S. 654, citing *Frost* v. *Earnest*; *Leonard* v. *Autocar Sales & Service Co.*, 392 Ill. 182, 190 (1946); *Goodyear Shoe Machinery Co.* v. *Boston Terminal Co.*, 176 Mass. 115 (1900). While petitioners cite Illinois cases (pet. 27) to the effect that a tenant may sue his landlord who disturbs or permits a co-tenant to "disturb his quiet enjoyment," they do not cite Illinois cases that hold the tenant may recover from the landlord for damage accruing from acts of the Government in the exercise of eminent domain, nor an Illinois case holding that he may recover moving expenses for any kind of eviction.

It has been held in Illinois that moving expenses may not be recovered in a tort action. In *Tobin* v. *French*, 93 Ill. App. 18, 22 (1900), in trespass on the case the defendants began alterations in the building for the purpose of adding two additional stories, and as a result great quantities of dirt, dust and lime poured into plaintiff's rooms, the stairways and halls were blocked, his furnishings were rendered unfit for use, his wife's health was impaired so that he was compelled to quit the premises. It was held that moving expenses could not be recovered. The court said, p. 22: "Although we regard the cost of moving as an improper element of damage in such a case, we don't think the admission of it in evidence constitutes a sufficient ground for reversing the judgment." This was because the amount of the judgment was "fully supported by other evidence." Petitioners admit (pet. 21): "The whole basis for reversing the judgments against Clark-Congress

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appears to have been the fact that moving expenses were included as items of petitioners' damages."

Advertising Checking Bureau, Inc. is not entitled to recovery from Clark-Congress for the value of the remaining period of its leasehold. In *U. S.* v. *Advertsing Checking Bureau, Inc.*, 204 F. 2d 770 (1953 7th Cir.) Advertising appealed from a summary judgment in this case below that it was not entitled to just compensation because of a condemnation clause in its lease. It contended that its leasehold had not been terminated and therefore it was entitled to just compensation. But the court held (p. 772) that Advertising's "lease terminated upon the taking by the Government."

II.

Petitioners argue that the decision below "is in irreconcilable conflict with the decisions of this Court which hold that the immunity of the sovereign does not protect parties with or through whom the sovereign deals against liability to those whom they injure in the course of their actions in the sovereign's behalf." (pet. 22); that the Court of Appeals treated the landlord's right of indemnity from the Government under its lease "as ousting the trial court from jurisdiction to grant relief against the landlord" (pet. 25); that the Court of Appeals ordered the claims stricken because it believed that these claims sought to recover indirectly from the sovereign what petitioners could not obtain from it directly. (pet. 25.)

The Court of Appeals made no decision as to immunity from suit; made no mention of the landlord's indemnity. It decided only that the moving expenses could not be included as damages.

The cases cited (pet. 22) which are asserted to be in conflict with the decision here, did not involve damages

consequential on condemnation, but involved: recovery of possession of land in *U. S.* v. *Lee*, 106 U. S. 196 (1882); an accounting under a certain contract in *Sloan Shipyards Corp.* v. *United States Shipping Bd. Emergency Fleet Corp.*, 258 U. S. 549 (1922); recovery of brokerage commissions by a broker in *Federal Land Bank* v. *Priddy*, 295 U. S. 229 (1935); damages for failure through negligence to provide proper care for cattle under a cattle-feeding contract in *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381 (1939); damages for death due to tort of steamship company in *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575 (1943). In all of these cases the question before the Court was not liability but whether the defendants were immune from suit. The Court of Appeals held not that Clark-Congress was immune from suit, but that it was not liable for moving expenses.

The language of the Court demonstrates it was not deciding a question of immunity by holding that the moving expenses resulted from the filing and "processing" a declaration of taking (Op. 82); and by the further holding that urging "breaches and violations of convenants of quiet enjoyment and peaceable possession because Clark-Congress, allegedly, ratified, sanctioned and acquiesced in the governmental acts culminating with instituting its condemnation case" does not go behind the taking. Such decision is utterly foreign to the question of immunity.

III.

Petitioners argue, (pet. 27) that the court below ignored and failed to apply the common law of Illinois, citing numerous cases from Illinois and other jurisdictions as holding that a tenant may sue a landlord "who disturbs or permits co-tenants to disturb his quiet enjoyment of the demised premises." (pet. 27.) We discussed this

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question under heading I, p. 6. The decision of the court below does not conflict with these cases—it only excludes moving costs arising from condemnation.

Petitioners cite *Dolman* v. *United States Trust Co.*, 134 N. Y. S. 2d 508 Sup. Ct. N. Y. Co. (1954) in an effort to escape the rule that covenants of quiet enjoyment are not breached through the exercise of eminent domain. The *Dolman* case also announces this rule. This case arose on a motion to dismiss the complaint as not constituting a cause of action. It alleged that for the purposes of inducing the city to acquire the premises by eminent domain, the defendant gave the city an option to purchase any award that defendant might receive in the event of condemnation for an amount less than the assessed valuation and the market value of the property. Thereupon the option was exercised and then the city condemned. The court held that the rationale behind the protection to the landlord from quiet enjoyment covenants "is that here is an act of Government separate and apart from the wish and cooperation of private parties;" but that this general rule does not exculpate the landlord where "the act of condemnation has been actively incited by the landlord for purposes of its own." In the face of the project of the Government to acquire and use the Rand McNally Building it is nonsensical to contend that Clark-Congress incited condemnation "for purposes of its own."

IV.

Under this heading petitioners admit that the court below "reached the conclusion that such claims (petitioners' claims) are permissible," in the District Court, but contend the effect of the decision is to deny jurisdiction of such claims in any case, by holding that a condemnee may not by cross-claim in a condemnation case

recover from private parties damages inflicted upon the condemnee in connection with the taking of property by the government. The simple answer is, as previously said in this brief, that the court below held only that petitioners may not have moving expenses on their cross-claims.

Petitioners also claim that the court's order to strike the counterclaim and cross-claims "vitiated and emasculated" (pet. 31) its holding that the cross-claims were properly filed. Since the claims were "bottomed on claiming damages because these three tenants had to find quarters elsewhere, and move," as the court expressed it, (Op. 82) they properly were ordered stricken.

V.

Petitioners say, p. 32: "The purpose of taking petitioners' lease space was to gain possession under the Government's lease, and not to gain title to the building." The purpose is stated in the complaint (R. 8) "the housing of Federal agencies outside the District of Columbia." The landlord's interest having been acquired by lease, it was necessary to condemn that of these tenants.

Petitioners state, "the Government's *lease* was *illegal*, the *taking* was *illegal*, and vacating the condemnation awards was likewise *illegal*." (pet. 32) The legality of the lease was neither raised nor decided below nor was it included in Questions Presented or Reasons for Granting the Writ.

Petitioners, p. 34, contend that the action of the Court of Appeals denies due process of law. To support this they set forth nineteen "important elements" as amounting to due process of law. They admit, p. 36, no one of these items standing alone would be a denial of due proc-

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ess but assert that the cumulative effect of all leaves petitioners "with no hope for a final order authorizing full payment of the entire value" for months or years to come. This list of "important elements" while impressive as to number is neither impressive nor important as to substance. We think we need say nothing more from the standpoint of Clark-Congress than that the whole list of items fails to demonstrate a denial of due process of law. None of these items intimates that petitioners did not, and many of them demonstrate that they did, have their day in court.

Conclusion.[3]

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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May 12, 1955.

[3] Respondent does not waive but reserves its right, in the event the Court takes this case, to urge and argue its motions to strike the counterclaim and cross-claims on the ground that Rule 71A(e) does not permit of their filing. (R. 72, 73, 75.)